IN THE DISTRICT COURT OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NO. 4D00-4484

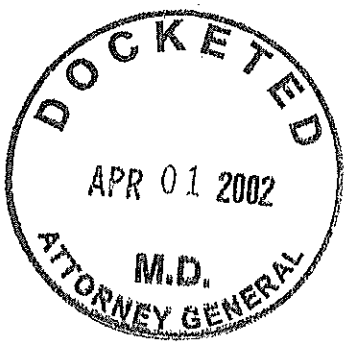
ERNESTO BEHRENS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.



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AN APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA CRIMINAL DIVISION

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ANSWER BRIEF OF APPELLEE

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ERNESTO BEHRENS V. STATE
CASE NO. 4D00-4484

CERTIFICATE OF INTERESTED PERSONS

Counsel for the State of Florida agrees with Appellant's certificate with the following additions:

Carney, James J., Assistant Attorney General

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CASES

PRELIMINARY STATEMENT

Ernesto Behrens was the defendant below and will be referred to as "Appellant." The State will be referred to as "Appellee." References to the record will be preceded by "V," with the appropriate volume number. References to any supplemental record will be preceded by "SR." All emphasis is added unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Appellee generally agrees with Appellant's statement of the case and facts, with the following additions, corrections and exceptions.

The victim testified that she could not see her attacker because her face was constantly covered with a pillow (V17 639). It can be difficult to tell if a man is circumcised when he is aroused and manipulating himself (V17 638).

Sharon Hinz, from the Miami-Dade Crime Laboratory Bureau, testified that when the swabs first came in they were assigned a specific case number (the homicide case) and a computer generated item number relating to each individual's swab samples (V17 712-13, 721, 723). That item number followed the samples in the lab (V17 713). The sticks on the swabs were broken off (V17 715). Each persons samples were taped on an index card that listed the date, the item number and the individual from whom the samples came (V17 713, 714). The samples were then placed in an envelope, which were sealed with evidence tape and initialed (V17 715). The samples were put in a freezer to await DNA testing at a later date (V17 715). Hinz did not prepare the index card or place Appellant's samples in the freezer (V 17 725). Ernesto Behrens' samples were assigned item number 232 (V17 722). Hinz developed the procedures for handling the swabs after they came into the lab (V17 754).

A property receipt was also prepared when the evidence was received (V17 757). The property receipt lists the specimen donor's name (Ernesto Behrens)(V17 760), the person who submitted the specimen to the lab (Detective Moore)(V17 760, 762, V18 1072), Behrens' date of birth (11/10/64)(V17 761), the address where the swabs were obtained ([redacted]) and the item number (232)(V17 759, 760).

Hinz later removed the samples from the freezer, prepared a transmittal form, and gave the sample to Dr. Kahn for testing (V17 725). Kahn signed for the sample (V17 725). Dr. Kahn conducted the test within the Miami-Dade Crime Laboratory (V17 717). The swabs never left the building (V17 736).

In 1997, after Dr. Kahn had conducted DNA testing, Hinz turned over a portion of item number 232 to Detective Geller of the Broward Sheriff's Office (V17 724, V18 800, 802). She prepared a card containing the items, case number, the item number (232) and the name (Ernest Behrens)(V18 803). She got the name and number from the three by five card (V17 769) and a list of items prepared by Theresa Merit, which listed the item number and the person associated with the number (V17 795-96, 799-800). The swabs were admitted in evidence over Appellant's objection (V18 806).

Hinz testified on cross examination that in her experience police officers routinely misstate the number of swabs they

submit (V18 810, 819-20). There was no contemporaneous objection to this testimony. When defense counsel suggested that Hinz had no idea how many swabs were submitted, she responded (V18 811):

> [WITNESS]: I would not say I have no idea; no because I know how these samples were submitted. I know that we asked for four swabs per individual, two swab packets, two swabs to a packet. Some packets from the manufacturer only had one swab so some packets only came in as three swabs.

When defense counsel suggested that someone named "Ernest Behrens may have submitted some of the swabs, Hinz responded (V18 818):

> [WITNESS]: I'm saying if there was an Ernest Behrens that submitted swabs, he would have been under a different item number at a different time so that would not have anything to do with this case.

Detective Butchko of the Miami-Dade Police Department testified that he was a co-lead detective on the serial murders occurring in the Tamiami area around 1995 (V18 852). He familiarized himself with all the people contacted to provide DNA swabs (V18 852-53). Butchko reviewed a list of the people who provided DNA swabs (V18 858). "Ernest Behrens" was not on that list (V18 854, 857, 858).

Detective Geller of the Plantation Police Department testified that he was the lead detective in the investigation of the sexual battery of the victim (V18 859-60). Geller retrieved a DNA swab from Sharon Hinz of the Miami Dade Crime Laboratory on

June 12, 1997 (V18 861-63). Geller took the swabs to Broward County Crime Laboratory for testing (V18 863-64). He did not know how many swabs were in the package he picked up (V18 874).

Donna Marchese, a forensic serologist, testified that she examined the victim's slip dress for evidence of semen (V18 893). The print on the dress made it difficult to detect semen with the laser (V18 895, 897, V19 997). It is very possible the dress contained semen evidence though it did not fluoresce (V18 897, 898).

Marchese testified that collectors of vaginal swabs will frequently label an item as "a" swab when there are actually two swabs in the packet (V19 1004).

On cross examination, defense counsel asked if Marchese had ever personally taken a swab from the defendant (V19 984). The prosecutor objected, asking to go sidebar (V19 984). He stated that he moved to get a sample from the defendant and the defendant objected and Judge Kahn would not allow the sample to be taken (V19 985). The prosecutor argued that the defense should be precluded from asking the question because the defense objected to the State taking the sample (V19 985). Defense counsel stated that was a different case and that he never prevented the State from taking a swab sample from Appellant (V19 985). The prosecutor indicated that it was a related case (V19 987). "They were traveling altogether at the same time." (V19

987). The trial court stated that if the sample had been allowed, the State may have been able to use it in this case (V19 986). However, the trial court then stated the question could be asked since the State did not request to take a sample in this case (V19 988).

Dr. Tracey did not testify that the margin of error in DNA testing is five to six percent (initial brief p. 8, V19 1048). The number 232, was Appellant's item number, not his "case" number (initial brief p. 4, (V17 721-22).

During the defenses case, Dr. Duran testified that Appellant's job at the time he was treated was cleaning office ventilation ducts (V19 1113). Duran testified that although the notes prepared by his wife indicated only one cyst was removed, he actually removed two cysts from Appellant (V19 1118). Duran testified "She lumped them in as one. It was a routine thing." (V19 1118). Appellant did not complain of any pain when visiting the doctor on May 10, 1995 and May 12, 1995 (V19 1115, 1116). He complained only of not being able to shower (V19 1115). He was well medicated (V19 1116). Appellant did not state he could not work (V19 1120).

Paula Turgeon testified that she was the defendant's girlfriend from 1989 to 1997 (V19 1144). Appellant was married at the time (V19 1144). She was assisting Appellant financially with this case (V19 1152). Appellant spent between 764 and 1910

nights with Appellant during their relationship (V19 1159). Although it occurred in 1995, she remembered the details of the date and time in question (the early morning hours of May 12, 1995) because she had started a new job (on May 8, 1995) and Appellant had recently had his operation (on May 8, 1995) (V19 1149, 1159, 1160). Turgeon specifically recalled that Appellant was in bed with her at 4:30 a.m. on May 12, 1995 (V19 1151). She did not remember the details of what occurred later that same day, even though it was a significant time for her (V19 1168-69). Turgeon did not remember the date Appellant called her and told he had been arrested for sexual battery (V19 1159).

Turgeon testified that Appellant and she ate dinner at a restaurant on May 11, 1995 (V19 1163-65). She then stated that they had dinner at her apartment that night (V19 1164). Turgeon testified at trial that she would not describe Appellant's pain as "excruciating." (V20 1177). On recross examination she admitted testifying in her deposition that Appellant was in excruciating pain, did not want to go anywhere, and only wanted to lie in bed and take his medicine (V20 1179).

According to Turgeon, Appellant was not circumcised (V19 1153). She claimed Appellant had a "pretty heavy" accent (V19 1154).

SUMMARY OF THE ARGUMENT

I

This claim was not fully preserved. Appellant has not met his burden of showing a probability of tampering.

II

The evidence was not solely circumstantial. It is not proper to weigh the evidence in ruling on a motion for judgment of acquittal. There was competent, substantial evidence supporting the verdict.

ISSUE I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE SWABS AS NO PROBABILITY OF TAMPERING WAS SHOWN.

STANDARD OF REVIEW

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981); General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

ARGUMENT

This claim was not fully preserved. At the time the evidence was admitted, defense counsel objected on the following grounds (V18 804, 805):

> [TRIAL COURT]: Any objection?
>
> [DEFENSE COUNSEL]: Yes, judge. We would object and ask for a brief sidebar.
>
> [DEFENSE COUNSEL]: At this time, they're trying to put in evidence the same item that we have been discussing from the beginning that they have not established the chain of custody on.
>
> [TRIAL COURT]: Let me se the - which is the handwriting she cannot identify? It's this here?

> [DEFENSE COUNSEL]: This is a different index card, judge. This one is not the same index card that we've been arguing about.
>
> [TRIAL COURT]: I understand that. Anything else?
>
> [DEFENSE COUNSEL]: Basically, the chain of custody has not been established. She does not have any personal knowledge of these swabs and where they have been until the time that she took where they have been until the time that she took them and now to, put them in evidence when we're alleging that it is not his, possibly given all the errors and fact that this card says Ernest Behrens, it should not be admitted.

Appellant's objection may have been specific enough to preserve the claim regarding the "Ernest Behrens" discrepancy. However, it was not sufficiently specific to preserve the claim that the swabs were not admissible as the evidence showed probable tampering because Officer Moore's testimony regarding the number of swabs submitted differed from Hinz's testimony regarding the number of swabs belonging to Appellant. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (for issue to be cognizable on appeal it must be the specific contention asserted below as the ground for objection) and Castor v. State, 365 So. 2d 701, 703 (Fla. 1978) (objection must be sufficiently specific to apprize the trial judge of the putative error).

To prohibit the introduction of evidence based on a chain of custody claim, the defendant has the burden of showing a ***probability*** of tampering with the evidence. State v. Taplis, 684

So. 2d 214, 215 (Fla. 5th DCA 1996). A mere possibility is insufficient. Davis v. State, 788 So. 2d 308, 310 (Fla. 5th DCA 2001).

The fact that the card prepared by Hinz said "Ernest Behrens" instead of "Ernesto Behrens" did not show a probability of tampering. Detective Butchko testified that no one named "Ernest Behrens" submitted samples (V18 854-58). Moreover, the Ernest Behrens index card contained Appellant's item number (232) assigned to him when the evidence first arrived (V17 712-13, 721, 723). Had an Ernest Behrens submitted a sample, it would have had a different item number (V18 818).

Similarly, the fact that one of the witnesses may have been confused about the number of swabs does not show a *probability* of tampering. This is especially true since Hinz testified that the officers submitting specimens were instructed to include a total of 4 swabs in the specimen (V18 811). It is hardly uncommon for these types of misstatements to occur and they do not indicate anything nefarious. In fact, Appellant's doctor admitted that the records prepared by his wife understated the number of cysts removed from Appellant's body (V19 1118). That fact does show a probability of any tampering. It was a simple misstatement[1].

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[1]Although not necessary to affirm on this issue, Appellee also notes that Hinz testified that police officers routinely misstated the number of swabs submitted (V18 810, 819-20). This testimony was brought out on cross examination and there was no contemporaneous objection. Moreover, Appellee does not agree

In McElveen v. State, 440 So. 2d 636 (Fla. 1st DCA 1983), the officer's testimony regarding the type of packaging of the marijuana specimen he submitted to lab differed from the testimony of the chemist who tested the marijuana. The Court found that the fact one of the witnesses may have been confused about the type of packaging involved did not show a probability of tampering. See also Neives v. State, 739 So. 2d 125, 126 (Fla. 5th DCA 1999)(discrepancy on transmittal sheets regarding number of cartridges and kind of magazine contained in boxes did not show a probability that evidence had been tampered with).

It is the rare case where all State witnesses present perfectly consistent testimony. Appellant has not met his burden of showing a probability of tampering. If Appellant sincerely believed there had been tampering with the swabs, he could have easily met his burden by submitting another sample. If the samples used at trial were really not his, the new sample would have revealed that fact, as well as gained Appellant his freedom.

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that this testimony is akin to convicting a defendant based on the general characteristics of criminals. At any rate, it is common knowledge that humans make these types of mistakes.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

STANDARD OF REVIEW

The purpose of a motion for judgment of acquittal is to test the legal sufficiency of the evidence presented by the state. In moving for a judgment of acquittal, a defendant admits all facts and evidence adduced at trial, and all reasonable inferences that may be drawn from such evidence must be viewed in a light most favorable to the state. If the evidence, when viewed in a light most favorable to the state, does not establish the prima facie case of guilt, the court should grant the motion. Espiet v. State, 797 So. 2d 598, 601 (Fla. 5th DCA 2001). The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. See Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974). See also Jones v. State, 790 So. 2d 1194. 1197-98 (Fla. 5th DCA 2001)(by applying the above standard, which is the same standard applied by the trial courts, the appellate courts are effectively conducting a *de novo* review).

ARGUMENT

Initially, Appellee does not agree that the evidence in this case was purely circumstantial. For example, Appellant claimed

the State failed to prove that the perpetrator penetrated the victim's mouth with his penis (V19 1078). The victim's testimony that the perpetrator stuck his penis in her mouth (V16 551) is not circumstantial evidence. Accordingly, the circumstantial evidence standard is inapplicable. See Orme v. State, 677 So. 2d 258 (Fla. 1996)(the circumstantial evidence standard only applies when *all* the evidence is circumstantial).

Even assuming the evidence was entirely circumstantial, this argument is without merit. The jury had to make a simple credibility determination. It could have concluded that Moore's testimony that he submitted only two swabs was not credible (i.e., that he was mistaken). See Morrison v. State, 2002 WL 432561, 13 (Fla. Mar. 22, 2002)(the weight of the evidence and credibility determinations are solely jury questions) and Donaldson v. State, 722 So. 2d 177, 182 (Fla. 1998)(where reasonable minds could differ as to proof of ultimate fact, case should be submitted to jury); Davis v. State, 425 So. 2d 654, 654 (Fla. 5th DCA 1983)(fact that evidence was in conflict does not entitle defendant to judgment of acquittal because weight of evidence and credibility of witnesses was for jury) and State v. Lewis, 543 So. 2d 760, 767 (Fla. 2d DCA 1988)(where defendant does not show probable tampering, claims of tampering go to weight of the evidence). This is especially true since Hinz testified that the lab requested the officers to submit four

swabs per individual (V18 811).

Similarly, the jury could have reasonably concluded that an "o" was left off Appellant's name on one of the cards. This was not an unreasonable conclusion since all the documents contained Appellant's item number (232)(V19 1080) and Butchko testified that no one name "Ernest Behrens" provided DNA specimens (V18 854, 857, 858).

CONCLUSION

Based on the preceding argument and authorities, this Court should affirm.

Respectfully Submitted,
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CERTIFICATE OF SERVICE AND FONT

I certify that a true copy of this document, prepared using 12 Courier New true type font, has been sent by courier to: James W. McIntire, Criminal Justice Building\6th Floor, 421 Third Street, W. Palm Beach, FL 33401, this 1 of April, 2002.

Of Counsel